IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

WEDNESDAY, THE 14TH MARCH 2007 / 23RD PHALGUNA 1928

RSA.No. 222 of 2007()

AS.98/2002 of DISTRICT COURT,KOZHIKODE
OS.250/2000 of ADDL.M.C-I.,KOZHIKODE

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APPELLANT/APPELLANT/PLAINTIFF:

MAKKEPPATTU KANARAN NAIR,
AGED 83 YEARS, S/O.KULANGARAKANDY,
THAMASIKKUM LAKSHMI AMMA, AGRICULTURIST,
PARANNUR AMSOM DESOM OF KOZHIKODE TALUK.

BY ADV. SRI.T.SETHUMADHAVAN
SRI.PUSHPARAJAN KODOTH
SRI.K.JAYESH MOHANKUMAR

RESPONDENT/ RESPONDENT/ DEFENDANT:

ASARIKANDIYIL SAROJINI AMMA,
AGED 56 YEARS, D/O.UKKU KURUP,
OWN AFFAIRS, KAKKUR VILLAGE,
PUNNASSERI AMSOM OF KOZHIKODE TALUK.

BY //

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON 14/03/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

M.SASIDHARAN NAMBIAR,J.

R.S.A .NO. 222 OF 2007

Dated 14th March 2007

J U D G M E N T

Plaintiff in O.S.250/2000 on the file of Munsiff court, Kozhikode is the appellant. Defendant is respondent. Appellant filed suit seeking a decree for mandatory injunction contending that he has a right of way through plaint B schedule way which is leading to plaint A schedule property and obstruction is being caused by respondent and therefore it is to be removed. Case of appellant is that plaint A schedule property belongs to him and he has been using plaint B schedule way as of right and as an easement without obstruction from 1960 onwards and therefore he has got a right of way by easement by prescription and respondent is not entitled to obstruct the same and therefore he is entitled to the decree sought for. Respondent in the written statement disputed the existence of plaint B schedule way. It was contended that there is no way through plaint B schedule property and there is alternative way to

appellant to reach plaint A schedule property from Kumaraswamy Raja road and appellant is not entitled to the right of easement by prescription or the decree for mandatory injunction. Learned Munsiff framed necessary issues. On the side of appellant apart from himself, two witnesses were examined and Exts.A1 to A5 and Exts.C1 to C3 were marked. On the side of respondent husband of respondent was examined as DW1. Commissioner was also examined as CW1. Exts.B1 to B3 were also marked. Learned Munsiff on the evidence found that there is no way as plaint B schedule and appellant did not establish a right of way by easement by prescription over plaint B schedule and held that appellant is not entitled to decree. The suit was dismissed but without cost. Appellant challenged the decree and judgment before District court, Kozhikode in A.S.98/2002. Learned District Judge elaborately appreciated evidence and confirmed the findings of learned Munsiff and dismissed the appeal. It is challenged in this second appeal.

2. Learned counsel appearing for appellant was heard. Arguments of learned counsel appearing for appellant is that Exts.C1 to C3 with the evidence of CW1 and Pws.2 and 3 establish that plaint B schedule way exists and it was obstructed by respondent and appellant

has been using that way as of right and as an easement for the last more than forty years and therefore courts below should have granted the decree sought for.

3. Appellant is claiming that he has prescribed a right of way by easement by prescription over plaint B schedule way. Learned Munsiff and learned District Judge on the evidence found that evidence establish that at the place where plaint B schedule way allegedly passes there was a building when respondent acquired her property under Ext.B1 in 1982 and the outer wall of the building touched the thodu. It was therefore found that there could not have been a way through that place where the building existed. The space now available was only due to re-construction of the original building which was demolished. The new building was constructed leaving a space at that place. Courts below also found that evidence of Pws.2 and 3 are unreliable and evidence is insufficient to prove that plaint B schedule way was in existence. Courts below on the evidence also found that there is no evidence to prove that appellant has been using that way as of right or as an easement openly and peacefully for more than the requisite period. That finding of fact cannot be interfered in exercise of the jurisdiction of this court under Section 100 of Code of

Civil Procedure. No substantial question of law is involved in the appeal.

Appeal is dismissed in limine.

M.SASIDHARAN NAMBIAR,
JUDGE.

uj.